

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARK A. MARTIN)	
Claimant)	
VS.)	
)	
CASE NEW HOLLAND)	Docket No. 1,028,706
Respondent)	
AND)	
)	
CNH AMERICA LLC)	
Insurance Carrier)	

ORDER

Respondent appeals the August 1, 2006 Order of Administrative Law Judge Kenneth J. Hursh. Claimant was awarded benefits in the form of temporary total disability and medical care after the Administrative Law Judge determined that claimant had suffered accidental injury arising out of and in the course of his employment with respondent, and had provided timely notice of that accident.

ISSUES

Respondent raises the following issues in its Application For Review filed with the Workers Compensation Board (Board):

1. That the Administrative Law Judge exceeded his jurisdiction in granting relief to the claimant.
2. That the Administrative Law Judge committed error in finding that the claimant suffered an accidental injury.
3. That the Administrative Law Judge committed error in finding that the claimant's alleged injury arose out of and in the course of his employment.
4. That the Administrative Law Judge committed error in finding that the claimant provided timely notice to the respondent.

- 5 That the Administrative Law Judge committed error in awarding temporary total disability benefits to the claimant.
6. That the Administrative Law Judge committed error in awarding medical compensation to the claimant.
7. That the findings and conclusions of the Administrative Law Judge are contrary to the preponderance of the credible evidence presented at the July 31, 2006 preliminary hearing.¹

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the undersigned Board Member finds the Order of the Administrative Law Judge (ALJ) should be affirmed.

Claimant alleges that he suffered an accident while unloading items off of a truck with a forklift. Claimant, a receiving clerk for respondent, was responsible for unloading trucks that came to respondent's distribution warehouse. Sometimes, he would unload items by hand, and sometimes he would use a forklift. On approximately March 1, 2006, claimant was unloading a truck with the aid of a forklift. A hydraulic dock plate, which was supposed to be set at the level of the truck, was too low. When claimant exited the truck, the forklift fell 2 to 3 feet, with claimant on the lift. This caused claimant's entire body to hurt. Claimant's supervisor, James Farley, witnessed the incident and commented to claimant that, "[i]f it hurts, don't run over it."² Claimant's testimony with regard to this incident and this conversation is uncontradicted, as Mr. Farley did not testify. Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy.³

Claimant testified that respondent's maintenance crew was called to fix the dock plate, but was unable to. Claimant identified Jerry Allen and Sam Hughes as the maintenance workers. Neither of those workers testified in this matter.

Claimant continued to work for several weeks, with his condition continuing to worsen. He first sought medical treatment with Midwest Orthopaedics, P.A., where he attempted to see Joel R. Lane, M.D. However, claimant was seen by physician's assistant

¹ Respondent's Application for Review at 1-2.

² P.H. Trans. at 9.

³ *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

Ken Filsinger, who then referred claimant for an MRI. This was accomplished on April 7, 2006. The MRI displayed a herniated disc at L5-S1 and mild spondylosis at L4-5.

Claimant underwent three epidural injections, administered by Joseph F. Galate, M.D., of Premier Spine Care, with relief only occurring after the second injection. Claimant was then referred to Adrian P. Jackson, M.D., also of Premier Spine Care, for a possible surgical consult. At the preliminary hearing, claimant admitted none of the medical treatment expenses had been submitted to workers compensation, instead being submitted to his health insurance. However, none of the medical treatment had been paid for by claimant's health insurance.

Respondent argues that claimant has failed to prove accidental injury arising out of and in the course of his employment, and that timely notice has not been proven. However, claimant's descriptions of the accident and his conversation with Mr. Farley are uncontradicted by any other testimony. This Board Member acknowledges that the histories given to the various health care providers are somewhat inconsistent. However, claimant is clearly not very good with details. He had trouble remembering the date of accident and appeared confused at the preliminary hearing on more than one occasion.

In workers compensation litigation, it is the claimant's burden to prove his/her entitlement to benefits by a preponderance of the credible evidence.⁴

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁵

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁶

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is

⁴ K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

⁵ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁶ K.S.A. 2005 Supp. 44-501(a).

not bound by medical evidence presented in the case and has the responsibility of making its own determination.⁷

Whether an accident arises out of and in the course of a worker's employment depends upon the facts peculiar to that particular case.⁸

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."⁹

Many of the questions raised by respondent could be clarified through the testimony of respondent's personnel. However, that testimony has not been presented. This Board Member finds, for preliminary hearing purposes, claimant's testimony is sufficient to carry his burden regarding whether he suffered accidental injury arising out of and in the course of his employment. Additionally, the fact that Mr. Farley was witness to the incident would constitute notice sufficient to satisfy K.S.A. 44-520.

Respondent also alleges the ALJ exceeded his jurisdiction in granting relief to claimant and erred in awarding temporary total disability and medical benefits to claimant.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?
2. Did the injury arise out of and in the course of employment?

⁷ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

⁸ *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556, rev. denied 235 Kan. 1042 (1984).

⁹ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

3. Did the worker provide timely notice and written claim of the accidental injury?
4. Is there any defense that goes to the compensability of the claim?¹⁰

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.¹¹

Temporary total disability and medical benefits are not only within the jurisdiction of an administrative law judge at a preliminary hearing, they are the administrative law judge's responsibility to determine. This Board Member finds the ALJ did not exceed his jurisdiction in awarding both temporary total disability and medical benefits from the preliminary hearing. The appeal of these preliminary benefits is not within the Board's jurisdiction from a preliminary hearing. Therefore, respondent's appeal of the issues regarding the award of temporary total disability and medical benefits is dismissed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹² Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, it is the finding, decision, and order of the Workers Compensation Board that the Order of Administrative Law Judge Kenneth J. Hursh dated August 1, 2006, should be, and is hereby, affirmed.

IT IS SO ORDERED.

¹⁰ K.S.A. 44-534a(a)(2).

¹¹ *Taber v. Taber*, 213 Kan. 453, 516 P.2d 987 (1973); *Allen v. Craig*, 1 Kan. App. 2d 301, 564 P.2d 552, rev. denied 221 Kan. 757 (1977); *Provance v. Shawnee Mission U.S.D. No. 512*, 235 Kan. 927, 683 P.2d 902 (1984).

¹² K.S.A. 44-534a.

Dated this ____ day of October, 2006.

BOARD MEMBER

c: James E. Martin, Attorney for Claimant
Gary R. Terrill, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge